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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

HENRI THOMPSON, et al.,

2:09-CV-905 JCM (RJJ)

Plaintiffs,

V.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, et al.,

Defendants.

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ORDER

15 Presently before the court is American Family Life Insurance Company's, American Family
16 Mutual Insurance Company's, and American Standard Insurance Company of Wisconsin's motion
17 for clarification of order granting motion for reconsideration. (Doc. #173). Herni S. Thompson
18 Agency, Inc., James Miller, and Herni Thompson have responded (doc. #180), and the movants have
19 replied (doc. #186).

20 Also before the court is American Family Life Insurance Company's, American Family
21 Mutual Insurance Company's, and American Standard Insurance Company of Wisconsin's motion
22 for attorneys' fees and costs. (Doc. #179). Herni S. Thompson Agency, Inc., James Miller and Herni
23 Thompson have responded (doc. #192), and the movants have replied (doc. #196).

Finally before the court is Herni S. Thompson Agency, Inc.'s, James Miller's, and Herni Thompson's motion for district judge to reconsider the order dismissing fraud claim. (Doc. #194). American Family Life Insurance Company, American Family Mutual Insurance Company, American Standard Insurance Company of Wisconsin have responded (doc. #201). To date, no reply has been

1 filed.

2 **I. Motion for Clarification (doc. #173)**

3 (A) James Miller Obligations

4 On January 31, 2011, this court ordered plaintiffs Herni Thompson and Herni Thompson
5 Agency to supplement responses to interrogatories submitted by the defendants. (Doc. #172).
6 Defendants now seek further response from James Miller in relation to interrogatories ten and
7 thirteen. Whereas plaintiffs have agreed to provide the requested supplementation in the response
8 brief (doc. #180), the motion is granted as to this issue.

9 (B) Requests for Production Nos. 6, 8, and 11

10 In the same January 31, 2011, order (doc. #172), the court declared that plaintiffs Thompson
11 and Thompson Agency were required to “either (1) provide the name of the Allstate entity employing
12 them to allow American Family to subpoena that entity; (2) avail themselves of the protective order
13 governing the confidentiality of proprietary information which has already been issued by this court;
14 or (3) produce documentation from Allstate supporting their position.” (Doc. #172 at 5:22–25).

15 Following that order, plaintiffs notified defendants that Allstate does not have control over
16 the requested information, as Thompson has been terminated from Allstate for falsification of
17 insurance documents. Accordingly, defendants now request that the court clarify Thompson and
18 Thompson Agency’s obligations to require production of “any documents responsive to Requests
19 Nos. 6, 8 or 11 that remain in their possession.” (Doc. #173 at 3:10-11). In light of this new
20 information, it shall be so ordered.

21 (C) Request for Production No. 35

22 In the January 31, 2011, order (doc. #172), the court denied defendants’ motion to compel,
23 as plaintiff Thompson represented that he had provided the requested phone bills from 2007 onward.
24 However, defendants now allege that plaintiff never provided the requested information.
25 Accordingly, the motion is granted, and plaintiffs shall provide defendants with all relevant records
26 within their possession.

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1 **II. Motion for Attorneys' Fees and Costs (doc. #179)**

2 “A party seeking discovery may move for an order compelling an answer, designation,
 3 production, or inspection” in certain circumstances. FED. R. CIV. P. 37(a)(3). “If the motion is
 4 granted . . . the court must, after giving an opportunity to be heard, require the party or deponent
 5 whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay
 6 the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.” FED.
 7 R. CIV. P. 37(a)(5)(A). There are three enumerated exceptions to this rule: (1) where the movant filed
 8 the motion before making a good faith attempt to obtain the discovery without court action; (2)
 9 where the opposing party was substantially justified in its non-response; or (3) where other
 10 circumstances make an award of expenses unjust. *Id.*

11 In the January 31, 2011, order, the court granted defendants’ three motions to compel in part
 12 (doc. #172), and the court finds that none of the three exceptions in Rule 37 apply. First, defendants
 13 have detailed their numerous attempts at settling these discovery issues without court actions in the
 14 response brief. (*See* doc. #179 at 2:17–3:16). Second, plaintiffs have failed to provide a substantial
 15 justification for their evasiveness. Finally, the court sees no other circumstances that would make
 16 an award of expenses unjust. Accordingly, the motion is granted, and defendants shall submit an
 17 appropriate application.

18 **III. Motion for Reconsideration of Order Dismissing Fraud Claim (doc. #194)**

19 Plaintiffs move the court to reconsider the July 22, 2009, order (doc. #50) and/or December
 20 7, 2009, order (doc. #99) dismissing without prejudice the claim of fraud in the inducement.
 21 Plaintiffs allege that the claim is not barred by the economic loss doctrine, and the court’s order
 22 dismissing it as such was contrary to Nevada law.

23 The court has revisited the disputed orders and finds that the claim was dismissed for failure
 24 to comply with Federal Rule of Civil Procedure 9(b), which requires that such a claim be pled with
 25 particularity. (Doc. #50 at 2:10–12); (doc. #99 at 2:11). Accordingly, plaintiffs’ arguments regarding
 26 the economic loss doctrine are inapposite, and the motion is denied.

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1 || Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the motion for clarification
3 of order granting motion for reconsideration (doc. #173) is GRANTED;

4 IT IS FURTHER ORDERED that defendants' motion for attorneys' fees and costs (doc.
5 #179) is hereby GRANTED and defendants shall submit an appropriate application;

6 IT IS FURTHER ORDERED that plaintiffs' motion to reconsider the order dismissing the
7 fraud claim (doc. #194) is hereby DENIED.

8 DATED this 16th day of May, 2011.

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Xenia C. Mahan
UNITED STATES DISTRICT JUDGE